2011 WL 7769147 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

Richard WILLIAMS, as Personal Representative of the Estate of
Mary Lee Enlow Deceased, and Vickie Lee Williams, Appellants,
v.
Kevin HEAVNER as Personal Representative of the Estate of Norman Heavner, Deceased, Appellee.

No. 87A05-1104-PL-00235.
November 23, 2011.

Appeal from the Warrick Superior Court No. 2
Lower Court Case No. 87d02-0511-Pl-387
Honorable Robert R. Aylsworth, Judge

Appellants' Reply Brief

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***i** TABLE OF CONTENTS

***ii** TABLE OF AUTHORITIES

Cases

Statutes

***1** *I. Statement of Additional Facts*

Prior to meeting Norman, Mary had had relationships with other men. She was married to John Enlow for about twenty-five years until he died in 1980 as a result of complications of heart surgery. They had one child, Vickie Williams. (Appellee's Appendix p. 34, Appellants' Supplemental Appendix pps. 3-4). Thereafter Mary entered into an approximately eight year relationship with Charlie Marsh, who had been married four times before he met Mary. (Appellee's Appendix pps. 276, 292, 299). After meeting Mary, Mr. Marsh parked his RV on her property, moved in with her, and went to work for her. (Appellee's Appendix p. 305). When Mr. March met Mary he had limited assets. He owned an RV and a lot for the RV. The RV was later traded in on another one purchased by Mary and Mr. Marsh, but it is unknown what, if any, ***2** his contribution toward the purchase was. Mr. Marsh got rid of the lot that the RV had set on, but it is unknown when, and there is no information that Mary received it. (Appellee's Appendix, pps. 300-301, 306).

Mary's relationship with Mr. Marsh ended when he died of a heart attack in South Dakota in 1991, after having been in poor health and after having previously suffered two major heart attacks. It was not unexpected that he would die of a heart attack. (Appellee's Appendix pps. 280-283, 302, 304). Following Mr. Marsh's death there was no investigation beyond that conducted by the coroner, no wrongful death claim was filed, and no estate was opened. (Appellee's Appendix pps. 307, 308).

Subsequent to Mr. March dying Mary married Thomas Kruger in 1995. At the time of the marriage Mr. Kruger no longer worked full time, lived in a part of his office, and owned no real estate and no substantial assets otherwise. (Appellee's Appendix pps. 262 - 264). During the marriage Mary and Mr. Kruger acquired several rental properties with Mary's savings and the income from rental properties that they acquired. When Mr. Kruger died six years later Mary retained ownership of the properties that had been acquired. (Appellee's Appendix pps. 265 - 266).

Like Mary, Norman had had prior relationships, having been married four times. In addition, in the year before he met Mary Norman placed an ad in a periodical through which he met a woman in Alabama, who he then moved in with for three or four months. Thereafter he moved in with Kevin Heavner, and while living with him Norman sought out another relationship pursuant to an ad he placed in the newspaper. He met Mary as a result of this ad. When Norman met Mary in person for the first time on December 21, 2002 he brought his personal belongings with him and moved into Mary's house. (Appellants' Supplemental ***3** Appendix pps. 40 - 43, 78, 79).

At least through 2002 Norman was in good physical condition. His eyesight had failed a little so that he gave up driving but he did not use a walker or wheelchair, was not seeing a doctor, and his overall health was pretty good. He was able to conduct his own financial and banking affairs and was not of unsound mind. (Appellants' Supplemental Appendix pps. 79 - 81).

Norman met with Randy Voight, a financial advisor at Edward Jones, beginning in Spring or Summer of 2004. Voight subsequently helped him with several change of beneficiary requests, including a TransAmerica annuity policy. Voight would not assist a client whom he thought to be of unsound mind, but he never determined Norman to be of unsound mind or incompetent. Norman expressed to Voight on several occasions that he did not have a good relationship with his children, wanted to change all of his beneficiaries, and wanted to exclude his children as beneficiaries of any of his estate and did not want to leave them anything, despite Mary encouraging him to leave his children something. (Appellants' Supplemental Appendix pps. 82, 85, 88 - 92, 97, 100 -102, 105 - 107).

Mary was not the dominant party in the relationship between she and Norman, but rather deprived herself because of him. Prior to meeting Norman, Mary visited with her daughter Vickie every five to six weeks. After Norman moved in and determined that he would not make that trip Mary stopped going also. When Norman got to the point where he could not go out with Mary the only time she went out by herself was usually to collect rent or take care of business pertaining to rental properties. While Norman was living with Mary her only grandson, whom she was close to, got married in Las Vegas. Mary did not go to his wedding, even though her daughter Vickie offered to pay for her and Norman's travel and accommodations, because ***4** Norman did not want to go. Mary did the household chores, including getting water for Norman and dialing the phone for him although he was able to do so. Mary made changes to her house so Norman could live there. She put in a wheelchair

ramp, installed handrails in the hallways, and replaced carpet. When Norman was hospitalized she fed him and stayed with him. (Appellants' Supplemental Appendix pps. 2 - 5, 26 - 29, 34 - 37).

Gayle Nelson, Director of the Vanderburgh County Adult Protective Services, investigated claims of **neglect** made against Mary. Norman reported to them that he was well cared for, denied that he wanted to leave Mary's home, and indicated that he wanted to stay in her home. After finding no evidence that Norman was being abused, **neglected**, or exploited Adult Protective Services found the allegations to be unsubstantiated and closed their files. (Appellants' Supplemental Appendix pps. 108, 113 - 115, 117, 119, 121, 127).

II. Summary of the Argument

Heavner relies all most exclusively on evidence he maintains establishes that Mary Enlow forged Norman Heavner's Last Will and Testament and his Power of Attorney, and that she exercised undue influence over Mr. Heavner during the period of their relationship. The Williams's believe the evidence does not establish those facts. There was no evidence that Mary Enlow occupied a position of dominance over Norman Heavner or that his decision to place his monies in a joint account with Mary or to name her as beneficiary to his annuities and insurance policies was done for any reason other than his own free will. Norman Heavner had an undisputed right to leave his assets to whomever he chose, and the trial court had no legal basis or authority to supersede those wishes by awarding those assets he had lawfully designated to ***5** Mary Enlow to anyone other than Mary Enlow. To do so was clearly an abuse of discretion. The trial court's judgment was against the logic and effect of the facts and circumstances before the trial as presented by numerous uncontroverted witnesses.

The sole basis cited by the trial court for its conclusion that Mary Enlow was not entitled to own the funds that she withdrew for her sole benefit was that all of the funds in the joint accounts originated with Norman, and not with Mary. The statutory presumption that Norman Heavner and Mary Enlow intended, during their lifetimes, to own the funds in their joint bank account in proportion to their net contributions, is rebutted by clear and convincing evidence to the contrary. There was clear and convincing evidence that Norman Heavner and Mary Enlow enjoyed a close, caring relationship.

III. Argument

Heavner argues that the facts surrounding the relationship between Norman Heavner and Mary Enlow created a presumption of trust and confidence with Mary Enlow being the dominate party and Norman Heavner being the subordinate party. Citing *Lucas v. Frazee*, 471 N.E.2d 1163, 1166-67 (Ind. Ct. App. 1984), Heavner argues that, if the evidence establishes: (a) the existence of such a relationship; and (b) that the questioned transaction between those parties resulted in an advantage to the dominant person in whom trust and confidence was reposed by the subordinate party, the law imposes a presumption that the transaction was the result of undue influence exerted by the dominant party, constructively fraudulent, and thus void. *Id.* at 1167. Heavner poses that he proved both (a) and (b), and that the burden then shifted to the Williams's to prove by clear and unequivocal proof that the questioned transactions were made at arm's length and thus valid. *Id.*

***6** Indiana Code 32-17-11-17 addresses ownership of joint accounts during the lifetimes of the account holders. Indiana Code 32-17-11-17 states:
(a) “Unless there is clear and convincing evidence of a different intent, during the lifetime of all parties, a joint account belongs to the parties in proportion to the net contributions by each party to the sums on deposit.

(b) Unless:

(1) a contrary intent is manifested by the terms of the account or the deposit agreement; or

(2) there is other clear and convincing evidence of an irrevocable trust; a trust account belongs beneficially to the trustee during the trustee's lifetime. If at least two (2) parties are named as trustee on the account, subsection (a) governs the beneficial rights of the trustees during their lifetimes. If there is an irrevocable trust, the account belongs beneficially to the beneficiary."

The evidence presented establishes that plaintiff failed to prove that Mary Enlow was the dominant party in the relationship between she and Norman Heavner, and therefore the transactions that resulted in financial benefit to her were not constructively fraudulent and were not void. Further, the evidence also clearly and convincingly shows that Norman and Mary did not intend for each of them to own the proceeds of their joint bank accounts in proportion to their net contributions. Kevin Heavner, personal representative of the Estate of Norman Heavner, testified that Norman and Mary met pursuant to an ad that Norman had placed, that Norman moved in with Mary on their first date on December 31,2002 and that never came back home. (Appellants' Appendix, Vol. 3, pp. 426-428). Norman died a little over three (3) years later. Leedra Adams was a tenant of Mary's, as well as an employee. She observed that Mary and Norman appeared to have affection for each other, appeared to care for each other, and believed them to be a couple. She also observed that Mary would do things for Norman and that she bought furniture and had her house redone to try to make the house so he could live there, ***7** including building a wheelchair ramp. (Appellants' Appendix Vol. 2, pp. 280-282, 316, and 322). Larry Home worked part time for Mary, was friends with she and Norman, and had a good opportunity to observe them, as he spent at least a month working on Mary's house to make it easier for Norman by removing carpeting and installing handrails and a wheelchair ramp. He felt that they were happy with each other and treated each other like **elderly** couples treat each other. (Appellants' Appendix Vol. 5, pp. 632-638). Norman made it clear that he did not wish for his children to inherit from him. Dave Krueger testified that roughly six months after Norman and Mary began living together that Mary told him that Norman did not want his children to inherit anything, and that he wanted her either to have his money or take care of his money for him. (Appellants' Appendix Vol. 2, pp. 268-274). Norman told Leedra Adams that he did not like Arlene (his daughter) mooching off him. (Appellants' Appendix Vol. 2, p. 317). Randy Voight was a financial advisor with Edward Jones who met Norman in 2004 and opened an Edward Jones account for Norman. Norman expressed to Voight on several occasions that he did not have a good relationship with his children and wanted to change all of his beneficiaries, and initiated a conversation with him requesting his help to effect the beneficiary changes. Norman also told Voight that he did not want to leave his children anything. When Voight was discussing with Norman his beneficiary designation form for his Edward Jones account he heard Mary tell Norman that he should leave something to his children, and in response to this Norman asked her to leave the room, which she did. Despite Voight telling Norman he could name one or more of his children as beneficiaries he chose to exclude his children as beneficiaries and named Mary as the beneficiary of his Edward Jones account. (Appellants' Appendix Vol. 4, pp. 547, 550-552, and 567-572).

***8** This testimony clearly establishes that people with close ties to both Norman Heavner and Mary Enlow believed the relationship to be one of mutual respect and affection, - a relationship wherein they were committed to each other - a relationship tantamount to marriage.

On the basis of the totality of the circumstances, indicating that Mary and Norman in essence lived as husband and wife and that Norman stated and acted upon his desire to not leave any significant property to his children, the evidence clearly and convincingly indicates that it was Norman's intention that Mary should be able use the account assets as her own. Based upon the foregoing it was error for the Court to have entered judgment in favor of the Appellee, as such ruling was contrary to law.

Under the same set of facts, the Williams's believe it was error for the trial court to conclude in regard to the Transamerica and AXA Equitable annuities that the evidence supported a finding that Norman Heavner was either of unsound mind, or that his signature came about as a result of fraud or undue influence, while at the same time finding that the evidence supported the conclusion that the transfer of the proceeds of the Edward Jones account to Mary Enlow should not be set aside. These transactions occurred within days of each other. If Norman Heavner were of sound and disposing mind when he acted with respect to the Edward Jones account, he was of sound and disposing mind when he acted with respect to his other holdings.

Every person has an insurable interest in his own life. When the person himself, in good faith, makes a contract, procures the insurance on his own life, pays the premiums, or otherwise provides for the disposition of his own monies, it is immaterial whether the beneficiary designated by him has any interest in the life of the insured or not. This doctrine is settled by this court, and is in accordance with the decided weight of authority. ***9** Amick v. Butler, 111 Ind. 578, 12 N.E. 518 (Ind.1887); *Hutson v. Merrifield*, 51 Ind. 24 (Ind.1875); Provident, etc., Co. v. Baum, 29 Ind. 236 (Ind.1867); *Burton v. Connecticut Mut. Life Ins. Co.*, ante, p. 207; *St. John v. American Mut. Life Ins. Co.*,13 N. Y. 31 (64 Am. Dec. 529). See note to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 92, 103, where the question is discussed and authorities are collected. *Clark v. Allen*, 11 R.I. 439 (23 Am. Rep. 496).

In the case of *Estate of Powers*, 849 N.E.2d 1212 (Ind.Ct.App.2005), decedent was the owner of three annuity policies and payor of their premiums. This Court found that he had the right to name whomever he wanted as beneficiary of the policies. This Court went on to state that, under Indiana law, a person has an insurable interest in the life of another where there is a reasonable probability that he or she will gain by the latter's remaining alive or lose by his death. *Estate of Powers* citing *State v. Willett*, 171 Ind. 296, 86 N.E. 68, 71 (Ind. 1908). This Court went on to state that "it is well settled in this state that an insurable interest does not arise from the mere fact of the kinship shown, but must be a pecuniary one, and be disclosed by the facts alleged."

Likewise, under the parole evidence rule, if the manifestation of intention of the settlor is integrated in a writing, that is, if a written instrument is adopted by him as the complete expression of his intention, extrinsic evidence, in the absence of fraud, duress, mistake or other ground for reformation or rescission, is not admissible to contradict or vary it. On the other hand, if the meaning of the writing is uncertain or ambiguous, evidence of the circumstances is admissible to determine its interpretation. It is only where there is an equitable ground for reformation or rescission, such as fraud, duress, undue influence or mistake, that such evidence is admissible. *Colbo v. Buyer*, 235 Ind. 518 (Ind. 1956).

10** ***IV. Conclusion

For the foregoing reasons, the trial court's rulings as argued above, should be reversed with judgment to the Williams's.

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